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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1445

SOUTHERN CALIFORNIA IBEW-NECA PENSION PLAN; THE NATIONAL ELECTRICAL BENEFIT FUND; and THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS PENSION BENEFIT FUND,

Petitioners,

vs.

FRANCES ELIZABETH JOHNSTON,

Respondent,

and

CLIFFORD ALBERT JOHNSTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT

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IN THE

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No.

SOUTHERN CALIFORNIA IBEW-NECA PENSION PLAN; THE NATIONAL ELECTRICAL BENEFIT FUND; and THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS PENSION BENEFIT FUND,

Petitioners,

vs.

FRANCES ELIZABETH JOHNSTON,

Respondent,

and

CLIFFORD ALBERT JOHNSTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT

The Petitioners, the Southern California IBEW-NECA Pension Plan, the National Electrical Benefit Fund, and the International Brotherhood of Electrical Workers Pension Benefit Fund, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal for the Second Appellate District entered in this proceeding on October 27, 1978.

OPINION BELOW

The opinion of the California Court of Appeal, 85 Cal. App. 3d 900 (1978), appears in Appendix A hereto; the minute order of the California Supreme Court denying Petitioners' request for a hearing is included in Appendix B.

JURISDICTION

The judgment of the California Court of Appeal for the Second Appellate District was entered on October 27, 1978. A timely Petition for Hearing was filed with the California Supreme Court, but that Court, on December 20, 1978, declined to grant a hearing. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Section 514 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144 ("ERISA"), states that the Act "shall supersede" any and all "laws, decisions, rules, regulations or other State action", insofar as they relate to employee benefit plans established or maintained by employers or employee organizations, with certain exclusions not pertinent here. The *first question* presented is whether Section 514 of ERISA preempts application of the California community property law to the limited extent that such state law cannot authorize or support a state court decision ordering a pension plan to pay to a divorced spouse a community property interest in the pension benefit which the participant spouse is receiving.

2. Among the specific provisions of ERISA are the requirements that: (1) benefits are payable only to "participants" or "beneficiaries" of the pension plan (ERISA Sections 3(6)(7) and (8) and 203(a); 29 U.S.C. §§ 1002(6)(7) and (8) and 1053(a)); (2) benefits under

a pension plan covered by ERISA cannot be forfeited, assigned or alienated (ERISA Sections 203(a) and 206(d)(1); 29 U.S.C. §§ 1053(a) and 1056(d)(1)); and (3) a fiduciary is personally obligated to act solely in the interests of, and to provide benefits to, the participants and beneficiaries (ERISA Sections 404(a)(1) and 409(a); 29 U.S.C. §§ 1104(a)(1) and 1109(a)). The *second question* presented is whether these sections of ERISA preempt application of the California community property law to the limited extent that such state law cannot authorize or support a state court decision ordering a pension plan to pay to a divorced spouse a community property interest in the pension benefit which the participant spouse is receiving.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article Six, Clause 2 of the United States Constitution, the Supremacy Clause. The United States statutes involved are Sections 3, 203(a), 205, 206(d)(1), 404(a)(1), 409(a), 514(a) and (c), and 1021(c) of the Employee Retirement Income Security Act of 1974; 29 U.S.C. §§ 1002, 1053(a), 1055, 1056(d)(1), 1104(a)(1), 1109(a), 1144(a) and (c), and § 1021(c).[2] The California statutes involved are California Civil Code Sections 687, 5105 and 5125. These Constitutional and statutory provisions are set forth in Appendix C.

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[1] For an explanation of the *limited nature* of Petitioners' preemption argument see Statement of the Case, p. 4, *infra*.

[2] Hereafter reference will be made to the sections of ERISA as set forth in P.L. 93-406. For example, reference to Pub. L. 93-406, Tit. I, § 514(a), 29 U.S.C. § 1144(a), will simply be stated "ERISA Section 514(a)."

STATEMENT OF THE CASE

On January 17, 1974, Clifford Albert Johnston ("husband") filed a petition for dissolution of his marriage to Frances Elizabeth Johnston ("wife"), in the Superior Court of California, County of Los Angeles. The wife asserted a community property interest in certain monies being paid to the husband by the Petitioners ("Petitioners" or "Plans").[3] This was done in an Order to Show Cause filed by the wife even before the Plans were made parties to the suit.

The Plans resisted the attempt to involve them in the litigation and the wife's attempt to enforce her community property interest against them. They unsuccessfully argued that the provisions of ERISA, including the express preemption provision and the anti-alienation and assignment provision, among others, prevented the California State Court from directing any order against them.

It should be emphasized that it was never argued that community property laws were totally preempted by ERISA. Rather, the contention was simply that community property laws were preempted to the limited extent that they cannot be the basis of an action or order against a plan. The non-participant spouse can still assert against the other spouse, and the state courts can still recognize, his or her community property claim in pension benefits. Such a right can be litigated between those parties and enforced in various ways not involving the plan.

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[3] It should be noted that all three of the Plans are "employee benefit plans" within the meaning of Section 3(3) of ERISA, and are thus covered by ERISA. The first two are employer-funded, multiemployer plans covering employees of numerous employers. The third plan, the IBEW Pension Benefit Fund, is a union dues financed pension plan covering members of the IBEW.

Subsequently, when the wife formally moved to join the Plans, the federal defenses were again raised. In addition, an unsuccessful suit was brought by the Plans in the federal district court seeking declaratory relief and an injunction against the California Superior Court's issuing orders against the Plans which would be inconsistent with the provisions of ERISA.

Eventually, the Superior Court conducted a trial on the federal contentions. On December 15, 1976, that court entered judgment rejecting the Plans' arguments and directing them to pay a portion of the benefits due the husband directly to the wife.

The Plans timely appealed to the California Court of Appeal. In a decision dated October 27, 1978, the California Court of Appeal rejected Petitioners' argument which was based on the general preemption clause of ERISA. The court reasoned that community property law does not relate to the federal "regulation" of pension benefit plans, but rather, would only affect the "distribution" of the benefit (Appendix A, p. 11a). The court also rejected the argument that an order directing payment to the wife would be a prohibited alienation or assignment, reasoning that the wife's community property claim was not a creditor assertion, such as would require an assignment or alienation of the husband's property, but was an assertion of the wife's community property right of ownership (Appendix A, pp. 14a and 15a).

The Petitioners sought review of the Court of Appeal decision in the California Supreme Court. But, as reflected in Appendix B, the California Supreme Court on December 20, 1978, declined to hear the case.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Concerns Federal Questions Not Yet Resolved by This Court Which Are of Immediate Practical Significance to Plans, Participants, Their Spouses and the Courts in the Eight Community Property States.

A. The impact of numerous ERISA provisions on the application of community property laws to private, federally regulated pension plans in divorce proceedings has not been determined by this Court. Recently, in *Hisquierdo* v. *Hisquierdo*, —— U.S. ——, 59 L.Ed.2d 1 (Jan. 22, 1979), when deciding that the community property laws of California impermissibly conflict with provisions in the Railroad Retirement Act, this Court noted:

> ". . . Our holding intimates no view concerning the application of community property principles to benefits payable under programs that possess these distinctive characteristics [of Congressional silence on spouse's benefits upon divorce and the pension is a private one which is merely regulated by ERISA]." 59 L.Ed.2d at 16, n. 24.

Nor has there been any clear guidance from the lower courts. For example, the United States District Court for the Northern District of California has addressed these community property-ERISA questions in two separate cases and has reached entirely opposite results. In *Frances* v. *United Technologies Corp.*, 458 F.Supp. 84 (N.D. Cal. 1978), the Court held that Section 514 of ERISA preempts state community property law to a limited extent and an award of a part of a participant's benefits to a divorced spouse would be an assignment or alienation prohibited by Section 206(d)(1) of ERISA. In *Stone* v. *Stone*, 450 F.Supp. 919 (1978), *appeal docketed*, Case No. 78-2313 (9th Cir.), another judge of the same Court held exactly to the contrary.

The Department of Labor, the federal agency with primary responsibility over Title I of ERISA (which includes Section 514), recently filed an *amicus* brief in the *Stone* case. While agreeing with the end result reached by the district court, the Department took the position that Section 514 *does preempt* California's community property laws to a limited extent. That position offers no clear guidance, however, because it is at odds with California State court decisions on preemption. For example, see *Campa* v. *Campa*, No. 1 Civil 42946 (Calif. Ct. App., Feb. 2, 1979); and *Johns* v. *Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California*, 85 Cal. App.3d 511 (Calif. Ct. App., 1978).[4] Moreover, the Department of Labor's position is internally inconsistent. It starts out supporting a preemption of California community property laws by ERISA; but, nevertheless, it ends up supporting the validity of a state court's directing an ERISA regulated plan to satisfy a community property based claim.

B. These unresolved federal questions are of wide-ranging practical importance. They affect countless pension plans, participants, spouses and courts in the eight community property states of California, Washington, Idaho, Texas, Nevada, New Mexico, Louisiana and Arizona. With the increasing frequency of divorce, the number of situations in which these isues can be raised is obviously large.

Just as significant is the burden placed upon the courts and plans by the litigation attributable to the uncertainty of the law. For example, in California alone the Petitioner IBEW Pension Benefit Fund, a small union dues plan open only to IBEW members, has been joined

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[4] Petitioners believe that the *Johns* case has been or will be appealed to this Court. While the Petitioners believe certiorari is the more appropriate method, they support the *Johns* appeal and request that should this Court decide to hear either case, it hear both.

in eight dissolution proceedings in 1978.[5] Due to the lack of definite legal rulings, each suit has required the expense of retaining a lawyer to appear, monitor the case, defend the suit by raising the federal issues, and attempt to devise a method to suspend final resolution of the case until such time as the legal issues are resolved. It is also likely that separate enforcement proceedings against plans to collect community property interests will become common. All of this has resulted in an undue burden on already scarce judicial resources.

There is also a far-reaching burden on the administration of pension plans as a result of community property-based orders such as this one. Briefly, such decisions have resulted in the following kinds of problems:

1. The threat that trustees, while forced to comply with state orders under penalty of contempt, may be personally liable for actions contrary to the requirements of ERISA;

2. Court-imposed changes in payment policies add to a plan's administrative and record keeping expenses;

3. The threat of a court-ordered lump sum payment to the non-participant spouse, which would prematurely drain a plan's assets;

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[5] Those cases are: *Bernard* v. *Bernard* (Superior Court of California, County of Marin, August 9, 1978); *Bospflug* v. *Bospflug* (Superior Court of California, County of San Diego, January 13, 1978); *Eggleson* v. *Eggleson* (Superior Court of California, County of San Mateo, June 14, 1978); *Huntington* v. *Huntington* (Superior Court of California, County of Los Angeles, July 11, 1978); *Szykowny* v. *Szykowny* (Superior Court of California, County of Marin, September 18, 1978); *Vaughan* v. *Vaughan* (Superior Court of California, County of San Mateo, May 24, 1978); *Ward* v. *Ward* (Superior Court of California, County of San Francisco, June 1, 1978); *Wells* v. *Wells* (Superior Court of California, County of Santa Clara, June 28, 1978).

4. A new uncertainty in the plans' basic actuarial assumptions because community property interests and assumptions attributable to the lives of former spouses were never considered;

5. The potential preclusion to a participant of certain options (e.g., early retirement, a different form of benefit payout, choice of a new beneficiary, choice of the ERISA-required joint annuity option) where a former spouse has directly enforced a community property interest in the benefit;

6. An uncertainty over whether a former, and even a present, spouse is entitled to the extensive information ERISA requires to be disclosed to participants and beneficiaries.

All of these factors support the grant of the writ in this case.

II. The Decision Below Conflicts With the Supremacy Clause Standards Established By This Court in Analogous Decisions Involving Community Property Law.

This Court recently stated that the Supremacy standard applicable where federal law is alleged to clash with a right based in state community property law is:

> ". . . [W]hether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition." *Hisquierdo* v. *Hisquierdo*, —— U.S. ——, 59 L.Ed.2d 1, 12 (1979).

In numerous cases, this Court has applied this type of a standard and held community property law to be preempted. *Hisquierdo* v. *Hisquierdo*, —— U.S. ——, 59 L.Ed.2d 1 (Jan. 22, 1979); *Wissner* v. *Wissner*, 338 U.S. 655 (1950); *McCune* v. *Essig*, 199 U.S. 382 (1905);

Yiatchos v. *Yiatchos*, 376 U.S. 306 (1964); and *Free* v. *Bland*, 369 U.S. 663 (1962).

Application of the appropriate standard to the instant case shows the decision below was in error.

A. By its express terms, ERISA provides:

> "Except as provided in subsection (b) of this section [dealing with insurance, banking and securities law], the provisions of this title [title I] and title IV *shall supersede any and all State laws insofar as they* may now or hereafter *relate to any employee benefit plan* . . .
>
> * * * *
>
> "The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." Sections 514(a) and (c). (Emphasis added.)

This language is a positive and direct enactment by Congress providing that no state action, in the broadest possible sense, can relate to an employee benefit plan. Certainly, a suit and a court order directed against a plan is state action which "relates" to a plan. The attempt by the court below to justify its contrary holding by stating that the order only affects the distribution of the benefit is without merit. *The Court below improperly ignored the plain meaning of the statutory language.* See *United States* v. *Oregon*, 366 U.S. 643, 648 (1961).

The legislative history supports the broad scope of this language and shows the clear objectives of Congress in enacting Section 514. Senator Javits, a sponsor of ERISA, said:

> "Both the House and Senate bills provided for the preemption of State law, but . . . defined the perimeters of preemption in relation to the areas regulated

> by the bill. *Such a formulation raised the possibility of endless litigation over the validity of State action* that might impinge on Federal regulation . . .
>
> "[O]n balance, the emergence of a comprehensive and *pervasive Federal interest and the interest of uniformity* with respect to interstate plans *required* —but for certain exceptions—*the displacement of State action in the field of private employee benefit programs.*" 120 Cong. Rec. S15751 (Aug. 22, 1974) (emphasis added).[6]

Senator Williams stated:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and *enforcement provisions* of the conference substitute *are intended to preempt the field* for Federal regulations, thus eliminating the threat of conflicting or inconsistent State or local regulation of employee benefit plans. *This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which may have the force or effect of law.*" 120 Cong. Rec. S29933 (Aug. 22, 1974), *Legislative History* at 4745-4746 (emphasis added).[7]

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[6] This statement appears in the Legislative History of the Employee Retirement Income Security Act of 1974, Committee Print, 94th Cong., 2d. Sess. at pp. 4770-4771 (1976) (hereafter referred to as "*Legislative History*").

[7] Numerous federal court decisions have endorsed an all-inclusive view of Section 514. See *Azzaro* v. *Harnett*, 414 F.Supp. 473, 474 (S.D. N.Y. 1976), *aff'd.*, 553 F.2d 93 (2d Cir.), *cert. den.*, 434 U.S. 824 (1977); *Wadsworth* v. *Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. den.*, 435 U.S. 980 (1978); *Hewlett-Packard Co.* v. *Barnes*, 425 F.Supp. 1294 (1977), *aff'd.*, 571 F.2d 502 (9th Cir. 1978), *cert. denied*, —— U.S. ——, 58 L.Ed.2d 125 (October 2, 1978); and *Standard Oil Co.* v. *Agsalud*, 442 F.Supp. 695 (1977), *appeal docketed*, No. 78-1095 (9th Cir.).

B. There are other express provisions of ERISA which reflect substantial federal objectives that conflict with a state court ordering a pension plan to pay a portion of a benefit to a divorced spouse who has a community property interest. Of primary relevance is Section 206(d)(1) of ERISA, which states:

> "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." [8]

The Court below held this language to be inapposite, reasoning that it was intended to prevent creditors, not a co-owner such as the spouse with a community-property interest, from asserting a legal claim against the plan. The same rationale had been used by the California Supreme Court in *Hisquierdo* v. *Hisquierdo*, 19 Cal.3d 613, 566 P.2d 244 (1977), but was rejected by this Court, which found such reasoning nonpersuasive, at least in view of the anti-assignment or alienation language of § 231 nn of the Railroad Retirement Act, 45 U.S.C. § 231 nn. That language is similar to § 206(d)(1). See *Hisquierdo* v. *Hisquierdo*, —— U.S. ——, 59 L.Ed.2d 1 (Jan. 22, 1979) at n. 19. Thus, a crucial basis for the decision below has been undermined by this Court's recent decision.[9]

Numerous other provisions of ERISA reflect a Congressional policy which would suffer major damage if a

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[8] Parallel language appears in Section 1021(c) of ERISA which adds Section 401(a)(13) to the Internal Revenue Code, 26 U.S.C. § 401(a)(13).

[9] It should be noted that this Court's decision in *Hisquierdo* was rendered subsequent to the decision below in this case. This raises the possibility that this Court should grant certiorari, but remand the case for consideration in light of the *Hisquierdo* decision. Petitioners respectfully suggest that, in view of the growing amount of litigation and the need for an early and definitive resolution, this Court should consider the issues presented here on the merits at this time.

federally regulated pension plan could be compelled to make payments of a community property interest directly to a divorced spouse. ERISA establishes a federal right to private pension benefits in pay status, running expressly to the employee "participant" or his or her designated "beneficiary." Sections 203(a) and 3(b)(7) and (8) of ERISA. A trustee cannot allow plan assets to be used by or for anyone other than a "participant" or "beneficiary" without violating the fiduciary duties imposed by ERISA. Sections 404(a)(1) and 409(a). A spouse who is claiming a community property interest is *not* a "participant" or "beneficiary". Sections 3(7) and (8).

C. In sum, a court order directing a federally regulated pension plan to pay a community property interest conflicts with the express terms of ERISA and does major damage to the ERISA objectives of: (1) avoiding state action that involves a plan; (2) avoiding litigation over state-based claims; (3) insuring uniformity of a federal substantive pension law; (4) making federal enforcement procedures exclusive; (5) protecting a participant's or beneficiary's benefit against any and all claimants and legal processes; and (6) imposing clear fiduciary requirements upon plan trustees.

CONCLUSION

For the reasons specified above, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal.

Respectfully submitted.

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Appendices

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

2 Civ. No. 52160

(Super. Ct. No. SO D54559)

In re the Marriage of
CLIFFORD A. and FRANCES E. JOHNSTON.
CLIFFORD ALBERT JOHNSTON,
Respondent,

v.

FRANCES ELIZABETH JOHNSTON,
Respondent and Cross-appellant,

and

SOUTHERN CALIFORNIA IBEW-NECA PENSION PLAN,
et al.,
Appellants and Cross-respondents.

[Filed Oct. 27, 1978, Clay Robbins, Jr., Clerk]

APPEALS from a judgment of the Superior Court of Los Angeles County. Charles S. Litwin, Judge. Affirmed in part; reversed in part.

Richard J. Davis, Jr., Daniel M. Wyman, Brundage, Beeson & Pappy, for Appellants and Cross-respondents.

John E. McDermott, Patricia M. Tenoso, Robert T. Olmos, Diane S. Messer, Western Center on Law and Poverty, Inc.; Toby S. Rothschild, Legal Aid Foundation

of Long Beach; Bruce K. Miller, Neal S. Dudovitz, National Senior Citizens Law Center, for Respondent and Cross-appellant.

No appearance for Respondent Clifford Albert Johnston.

The Southern California IBEW-NECA Pension Plan, The National Electrical Benefit Fund and The International Brotherhood of Electrical Workers, (hereinafter "claimants") have appealed from a judgment awarding to respondent and cross-appellant, Frances Elizabeth Johnston (hereinafter "wife") one-half of the pension benefits to which respondent Clifford Albert Johnston (hereinafter "husband") is entitled and requiring that claimants pay the proportionate share of wife directly to her. Claimants also appeal from that portion of the judgment denying to them an award of attorneys' fees.

Cross-appellant, wife, appeals from that portion of the same judgment which authorizes claimants to deduct from each monthly pension benefit payment the sum of $5.00.

Husband and wife were married on December 10, 1936. On January 17, 1974, husband filed a petition for dissolution of that marriage. The amended response to the petition filed by wife listed as assets of the marriage, inter alia, pension funds payable monthly to husband, under the control of claimants.

On May 19, 1976, on motion of wife, claimants were joined as parties to the dissolution action. Claimants filed suit in the United States District Court, seeking an injunction against the Los Angeles Superior Court to prevent it from enforcing any judgment against claimants. That action was dismissed by the Federal District Court on July 16, 1976.

Husband and wife entered into a stipulation concerning disposition of all of the assets of the marriage. The husband's pension benefits, the largest asset of the marriage,

were stipulated to be community property. It was further stipulated that wife was to receive 50 percent of each and every payment to which husband was entitled. The issue of the obligation of claimants to pay wife's share directly to her was bifurcated for purposes of trial. Following a trial on that issue, on August 10, 1976, the court rendered its intended decision, which included the following findings: "The court further finds that since the date of separation petitioner has received pension benefits which he failed to share with respondent and by petitioner's own testimony —the possibility exists that if necesary—petitioner would use future benefits for his own use and refuse to pay respondent's share to her. Therefore, the court finds that an order requiring claimants to pay respondent's share directly to her is 'necessary to the enforcement of the judgment.'"

On December 15, 1976, judgment on the bifurcated proceeding was entered. That judgment contained the following orders:

"Claimants IBEW-NECA Pension Plan, National Electrical Benefit Fund and International Brotherhood of Electrical Workers are each permanently enjoined to pay a portion of the monthly benefit due petitioner Clifford Albert Johnston directly to respondent Frances Elizabeth Johnston for each month that petitioner shall remain eligible for such benefits in the following manner:

"A. Claimants IBEW-NECA Pension Plan, National Electrical Benefit Fund and International Brotherhood of Electrical Workers may deduct from the combined pension benefits of petitioner Clifford Johnston a total of $5.00 to cover said claimants' excessive administrative costs of compliance with the order of this court.

"B. One-half of the balance of the remaining pension benefits after deduction of the $5.00 due to petitioner Clifford Johnston shall be paid each month by said claimants directly to respondent Frances Elizabeth Johnston.

"3. Counsel for claimants Brundage, Beeson and Pappy, . . . request for attorneys' fees in the amount of $200 is denied."

On this appeal from the judgment, claimants contend that the trial court erred in ordering direct payment to wife of one-half of husband's pension benefits for the following reasons:

A. The Employee Retirement Income Security Act of 1974 is legislation occupying the entire field of pension distribution and preempts all state action in connection therewith;

B. The trial court's order requires claimants to violate the terms of their employee benefit pension program enacted pursuant to the federal Employee Retirement Income Security Act.

Claimants further contend that the court erred in denying their request for attorneys' fees, arguing that under both California and federal law, such an award of fees is authorized.

We affirm both of the trial court's orders for the reasons set forth in this opinion.

Wife contends in her cross-appeal that the trial court erred in permitting the claimants to deduct $5.00 from the monthly benefits due to wife and husband, inasmuch as the record offers no support for the need for such a deduction and further no authority therefor is found in the law or the language of the benefit plans themselves. We agree and reverse that portion of the trial court's judgment authorizing the $5.00 monthly deduction.

DISCUSSION:

I. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT DOES NOT PROHIBIT THE STATE COURT FROM ORDERING CLAIMANTS TO MAKE PENSION PAYMENTS DIRECTLY TO WIFE.

The pension benefits which are the subject of the instant litigation are clearly community property. This is so not only by virtue of the stipulation of husband and wife but by settled law in California. Although some uncertainty previously existed concerning the community nature of unvested pension benefits, our Supreme Court in *In re Marriage of Brown* (1976) 15 Cal.3d 838 at 842, expressly resolved the problem: "Pension rights, whether or not vested, represent a property interest; to the extent that such rights derive from employment during coverture, they comprise a community asset subject to division in a dissolution proceeding."

In addition, California has long recognized the power of the court in a dissolution action to order the distributor of pension benefits to pay those benefits directly to a nonemployee spouse. (*Phillipson* v. *Board of Administration* (1970) 3 Cal.3d 32; *In re Marriage of Sommers* (1975) 53 Cal.App.3d 509, 515; *In re Marriage of Brown, supra*, 15 Cal.3d at p. 848; *In re Marriage of Verner* (1978) 77 Cal.App.3d 718, 725.)

A pension plan may properly be joined as a party to a dissolution action, whenever it holds in its possession funds which constitute a community asset. (*In re Marriage of Sommers, supra*, 53 Cal.App.3d at p. 515.) In addition, the wisdom of requiring distribution of pension benefits directly to a nonemployee spouse has been acknowledged in the California courts. For example, in *Phillipson* v. *Board of Administration, supra*, 3 Cal.3d at page 43, the court stated in that connection: "An award

to plaintiff of a 'property interest' which consists of no more than a right to enforce payments to her ex-husband would indeed be vacuous."

Further, the fact that the source of the funds sought to be disposed of in the dissolution action is federal has been deemed to present no barrier to the power of the California court to award it to either spouse. "[T]he principle that retirement benefits are community property has been held to apply whether the source of the retirement fund lies in a state, federal, military, or private employment relationship. [Citations.]" (*In re Marriage of Fithian* (1974) 10 Cal.3d 592, 596.)

Appellant contends that, in spite of all of the foregoing, the Employee Retirement Income Security Act (hereinafter "ERISA") deprives California courts of jurisdiction over pension plan benefits. Our research has disclosed no California cases discussing the impact of ERISA on such pension benefit distribution. Whether the preemption of state laws relating to pension plans set out in ERISA affects the kind of order made in this case, appears to be a question of first impression in California.

Our analysis is aided, however, by California cases discussing federal preemption in closely analogous areas and by cases from other jurisdictions which have considered the impact of ERISA on other state legislation. We have concluded that Congress did not intend to interfere with a state court's jurisdiction over distribution of marital property.

The Impact of ERISA:

ERISA was enacted by Congress in 1974. The Act was adopted upon findings by the Congress that employee benefit plans had proliferated; that the plans were national in scope and affected with a national interest; that regulation, supervision and accountability to the employees was

either nonexistent or inadequate; that many plans were unsound or unstable; that there had been defaults in terminations to the detriment of employees and their beneficiaries; and that ". . . it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness." (29 U.S.C. § 1001(a).) Congress therefore declared it public policy of the Act, inter alia, to require disclosure and reporting procedures and to establish standards of conduct, responsibility, and obligations; to provide remedies and sanctions; and to protect the interests of participants and beneficiaries ". . . by improving the equitable character and the soundness of such plans . . . ." (29 U.S.C. § 1001(c).)

In order to avoid "the possibility of endless litigation over the validity of state action that might impinge on federal regulation . . . and potentially conflicting state laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme," (120 Cong. Rec. 29942 (1974) Remarks of Senator Javits) Congress enacted the following preemption statute: ". . . this chapter shall supersede any and all State laws insofar as they may now or hereafter *relate to any employee benefit plan* described [herein] . . . ." (Emphasis added.) 29 U.S.C. § 1144.)

The issue before this court is whether Congress, by that language, intended to interfere with the distribution by a state court in a marital dissolution action of pension benefits subject to federal regulation.

Federal Preemption of California Community Property Statutes:

The definitions contained within ERISA make it clear that the court order in this case is a "state law" and that

the pension plan involved herein is an "employee benefit plan." (29 U.S.C. § 1144(c).)

The California Supreme Court discussed the general principles which regulate an analysis of federal preemption of state regulation in *In re Marriage of Hisquierdo* (1977) 19 Cal.3d 613, at p. 616, as follows: "The principle that has emerged from these decisions is that whenever there is a conflict between a federal statute affording annuity or insurance benefits and state community property laws the federal statutes must prevail. However, if the intent of Congress in creating the federal right is not violated by application of California's community property laws, then the status of such rights is governed by California law. [Citations.]"

A similar analysis is found in *In re Marriage of Jones* (1975) 13 Cal.3d 457 at page 461. There, the Supreme Court analyzed numerous federal statutes regulating the administration of military disability pay and concluded: "Congress, of course, may determine the community or separate character of a federally created benefit, and such determination binds the states. [Citations.] We find nothing in the statutes providing military disability pay, however, or in the history of the enactment and administration of those statutes, to suggest that Congress intended itself to determine whether the right of a married veteran, resident in a community property state, to disability pay is a community asset. We may therefore define the nature of the treatment to be accorded this benefit according to principles of California community property law so long as the result does not frustrate the objectives of the federal legislation. (*In re Marriage of Fithian, supra,* 10 Cal.3d 592, 597 & fn. 4.)"

Our conclusion that Congress did not intend, by the broad preemptive language of ERISA, to interfere with a state's right to control distribution of marital property,

is consistent with the manner in which California courts have interpreted similar legislation. In *Phillipson* v. *Board of Administration, supra,* 3 Cal.3d at page 45 et seq., the court discussed particular Government Code sections controlling and limiting the distribution of pensions, some of which were similar to legislation contained in ERISA. Under consideration was Government Code section 21203, which provided: ". . . after a member has qualified . . . as to age and service for retirement for service, nothing shall deprive him of the right to a retirement allowance under this part."

The court concluded (at p. 50): ". . . we do not believe the Legislature has declared the employee's right to a pension so sacrosanct that it is incompatible with his spouse's ownership of her community share in it."

The *Phillipson* court ordered the Public Employees Retirement System to pay over directly to the wife the share in her husband's retirement account which had been awarded to her.

We likewise conclude that nothing contained in ERISA leads necessarily to the conclusion that Congress intended to enter into this field so traditionally local.

Preemption by ERISA of Laws not Related to Property:

Claimants contend that because the judgment requiring that they pay pension benefits directly to wife is a law "relating to" an employee benefit plan, it is clearly prohibited by the ERISA preemption section. Wife, understandably, contends to the contrary. A number of federal court decisions have been rendered since the enactment of ERISA where preemption has been found to prohibit state action. For example, in *Hewlett-Packard Co.* v. *Barnes* (N.D.Cal. 1977) 425 F.Supp. 1294, a declaratory relief action was brought by California employers and managers of benefit plans. The plans concededly fell within

the meaning of ERISA and were therefore subject to regulation under that Act. Each was also admittedly a "health care service plan" within the meaning of Article I of the Knox-Keene Act of California. The issue before the court in *Hewlett* was whether ERISA preempted Knox-Keene with respect to the administration of those plans. The court said at page 1297: "When Congress exercises a granted power in a field which states have traditionally occupied, and unmistakably evinces its intent to exclude states from asserting their police power in that field, the federal legislation may displace state law under the supremacy clause. See *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142, 146-147, . . .; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 229-231, . . ."

The court found that ERISA, which expressly supersedes all state laws which "relate" to any employee benefit plan, preempts the state regulation of such plans by means of the Knox-Keene Act. In reaching that conclusion, the court noted that the House version of the bill from which ERISA derives initially limited the scope of preemption to state regulation of areas expressly covered by the bill, such as reporting, disclosure, and fiduciary duties with respect to the plans. The more sweeping preemption language which was ultimately enacted was preferred, as explained by Senator Harrison Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, for the following reason: "It should be stressed that . . . the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." (120 Cong. Rec. 29933 (1974).)

The *Hewlett* court thus concluded that all state regulation and administration of pension plans was intended to be preempted by this legislation. To the same effect, see *Wayne Chemical* v. *Columbus* (1977) 426 F.Supp.

316, 567 F.2d 692, 698; *Standard Oil* v. *Agsalud* (1977) 422 F.Supp. 695; and *Azzaro* v. *Harnett* (1976) 414 F.Supp. 473.

It appears clear that where the legislation or judicial order in question affects the administration or regulation of a pension plan, such order is prohibited. However, the order in the instant case only affects distribution of the pension benefits after a right thereto has been established under federal law.

The report of the House Education and Labor Committee concerning intended preemption under ERISA states: "Except where plans are not subject to this Act and in certain other enumerated circumstances, state law is preempted. Because of the interstate character of employee benefit plans, *the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluation of fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports.*" (1974 U.S. Code Congressional and Administrative News, p. 4655.) (Emphasis added.)

Effect of ERISA on California Community Property Law:

We are persuaded that the characterization of pension benefits in California as community property and the order to the plan to pay a portion of those benefits directly to the nonemployee spouse do not in any way frustrate the congressional plan embodied in ERISA in general or in the preemption section in particular.

The laws relating to marital dissolution are uniquely local in nature. "The whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States." (*In re Burrus* (1890) 136 U.S. 586, 593-594.) "Domestic relations is a field peculiarly suited to state regulation and

control, and peculiarly unsuited to control by federal courts." (*Buechold* v. *Ortiz* (9th Cir. 1968) 401 F.2d 371, 373.) In *In re Marriage of Pardee* (1976) 408 F.Supp. 666 (C.D.Cal.) a dissolution action was brought in California. Wife sought to join a pension plan as a party and the plan filed a petition to remove the case to federal court. In ruling on the propriety of federal jurisdiction, the court noted that it was the position of the petitioner that ERISA superseded all state laws relating to employee benefit plans and that the state court thus had no jurisdiction to order payment. The court said (at p. 669): "Whether the community property laws are such laws is not stated in the Act. If they are determined to be such, the federal judiciary will have been granted a roving commission to delineate family property law with little assistance from the Congress as to how to proceed. Hopefully Congress did not intend that the members of the federal judiciary begin ad hoc to create a body of federal common law in an area so traditionally the preserve of the states." The court notes at footnote 4 on that page: "The legislative history suggests that the congressional interest in uniformity was confined to matters involving the minimum standards of pension plans and the safeguards necessary to secure equitable administration. . . . An intent to regulate pension plans does not necessarily include an intent to control the state's distribution of family assets in divorce and separation proceedings."

The *Pardee* court ordered that the matter be remanded to the state court.

The United States District Court for the Northern District of California recently resolved the precise issue before this court. In *Stone* v. *Stone* (1978) 450 F.Supp. 919, the court considered whether a state divorce decree requiring the pension plans to pay directly to wife a portion of the pension benefits due husband was invalid be-

cause preempted by ERISA. The *Stone* court first observed at page 924 that: "Congress does not infringe *sub silentio* 'the power to make rules to establish, protect, and strengthen family life [which] is committed by the Constitution of the United States . . . to the Legislature of [each state.]' *Labine* v. *Vincent*, 401 U.S. 532, 538 . . . . (1971)."

Reviewing the preemption clause of ERISA, the court noted that the sections were certainly intended to have broad preemptive effect. However, they were intended to affect only laws *relating to* employee benefit plans and not to preempt any state law with only a tangential relationship to ERISA. The *Stone* court reviewed cases where ERISA has been held to preempt state legislation, such as, *Standard Oil Company of California* v. *Agsalud, supra*, 442 F.Supp. 695. The court observed that where local legislation which regulates pension or health plans has been deemed preempted, the intended beneficiaries suffer no loss, because of the parallel protection provided them by ERISA. The court notes, however, "The intended beneficiaries of the California community property laws would be placed at a significantly greater disadvantage by preemption. Preemption would deprive nonemployee spouses of the share in marital assets which they indirectly helped to acquire, and it would leave them without effective remedies against their husbands, . . . It is more reasonable to believe that Congres was willing to tolerate the adverse consequences of preemption of state health insurance laws than the consequences of preemption of state community property laws. [¶] For these reasons, California's community property laws do not relate to employee benefit plans within the meaning of section 514(a)." (*Stone* v. *Stone*, *supra*, 450 F. Supp. at p. 933.)

We conclude that the preemption clause of ERISA does not effect the operation of California community property laws; that ERISA does not interfere with the power of

California courts to divide pension benefits between a husband and wife and to order direct payments of those benefits to a nonemployee spouse; that California community property law does not relate to and is thus not included in federal regulation of any pension benefit plan.

II. THE ORDER FOR PAYMENT OF PENSION BENEFITS DIRECTLY TO WIFE IS NOT AN ASSIGNMENT OR ALIENATION OF THOSE BENEFITS.

Section 206(d) of ERISA provides: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

Claimants contend that the court order requiring direct payment to the spouse is an order of assignment or alienation and is thus an order which requires that claimants violate federal law. This contention is not well taken.

California law has long recognized that the claim of a spouse to her share of community property is not a claim requiring transfer or assignment of property, but is an assertion of a right of ownership. In *Phillipson* v. *Board of Administration*, *supra*, 3 Cal.3d 32, the court held that the award of a portion of husband's retirement fund to the nonemployee spouse did not violate the prohibition against assignment of pension rights found in Government Code section 21201, which provided in part: "[T]he right of a person to any benefit or other right under this part and the money in the Retirement Fund is not subject to execution, garnishment, attachment, or any other process whatsoever and are [*sic*] unassignable." The *Phillipson* court held (at p. 44): "Plaintiff, however, claims not as a creditor, but as an owner with a 'present, existing, and equal interest.' [Citations.] The recognition of an ownership claim cannot be described as a levy of execution, garnishment, attachment or assignment of property. (To

the same effect, see *In re Marriage of Verner*, *supra*, 77 Cal.App.3d 718, 725; *In re Marriage of Hisquierdo*, *supra*, 19 Cal.3d 613, 616.)[1]

The order of the court complained of herein did not require an assignment or alienation of the employee's benefits.[2] The order affirmed the nonemployee spouse's existing property interest. The distribution of that interest directly to the nonemployee spouse, therefore, will represent no violation of federal law.

III. THE TRIAL COURT DID NOT ERR IN DENYING THE CLAIMANTS' REQUEST FOR ATTORNEYS' FEES.

Claimants contend that the attorneys' fees requested herein could have been awarded under either California or federal law. Claimants correctly point out that California Civil Code section 4370 provides for the award of attorneys' fees in dissolution actions, and argues that claimants as a party to the dissolution action are included in the persons entitled to such an award.

Claimants also cite section 502(g) of ERISA found at 29 U.S.C. section 1132(g) which authorizes the award of

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[1] The case of *Francis* v. *United Technologies Corporation* (U.S. Dist. Court, N.D. Cal., No. C77-1504 CFP) cited to us by claimants, is not persuasive. In *Francis*, the trial judge disagreed with the holding of his colleague in *Stone* v. *Stone*, *supra*, 450 F.Supp. 919, and found that the assertion of a nonemployee spouse's community property interest in a retirement plan would require an assignment of benefits, prohibited by ERISA. For the reasons stated in this opinion, we do not agree with that conclusion. We find that the reasoning of *Stone* is in keeping with California's interpretation of community property legislation and federal preemption thereof.

[2] This same conclusion was recently reached by the United States District Court for the Southern District of New York in *Cartledge* v. *Miller* (1978) —— F.Supp. —— (B.N.A. Pension Reporter, 9/18/78, at p. D-5) and by the United States District Court for the Eastern District of New York in *Cody* v. *Riecker* (1978) 454 F.Supp. 22.

reasonable attorneys' fees in any action brought under the Act.

However, the language of both sections previously referred to is discretionary, not mandatory. Section 4370 of the California Civil Code provides that the court *may* order reasonable attorneys' fees for the prosecution or defense of a dissolution action.

29 U.S.C. 1132(g) provides that the court in its discretion *may* allow reasonable attorneys' fees to either party.

We need not decide whether claimants, as parties joined in a dissolution action on motion of one of the spouses, could be awarded attorneys' fees under California Civil Code section 4370, because nothing in the record demonstrates that the trial judge abused his discretion under either statute in denying the attorneys' fees requested by claimants. The exercise of discretion was, therefore, a proper one, and the court's order will not be disturbed on appeal.

IV. THE TRIAL COURT ERRED IN PERMITTING THE CLAIMANTS TO DEDUCT FIVE DOLLARS PER MONTH FROM THE SPOUSES' BENEFIT PAYMENTS.

On August 10, 1976, the court issued a Minute Order setting forth its findings and intended decision. Included therein was the following: "This court is further of the opinion that to require claimants to pay a portion of the pension benefit directly to respondent would not infringe or interfere with Congress' intent to devise a comprehensive Federal regulatory program to supervise, protect and guarantee retirement benefits and/or to regulate and protect employees benefit plans. Such an order will not affect the supervision, protection, and/or guarantee of retirement benefits, nor will it affect the regulation and/

or protection of employee retirement benefits. [¶] If some additional burden is placed upon the trustees of the Pension Fund, such as issuing two checks and the giving of notice to Respondent, if required, the evidence before the Court does not establish such an undue burden as would interfere with the general purposes of the Act and/or the intent of Congress." The court concluded: "It is therefore the intention of the Court to order claimant to pay directly to Respondent each month one half of the pension benefits due petition."

Thereafter, on November 16, 1976, claimants filed a proposed judgment, which included an order that claimants deduct the sum of $5.00 per month from the portion of the pension benefits payable to wife. The court judgment, filed December 15, 1976, ordered the $5.00 deduction, but required that it be deducted from the total monthly payment due the Johnstons, and that the balance remaining after that deduction be divided equally between the parties.

We have concluded that the court erred in authorizing the $5.00 deduction from the payments. The record on appeal does not reflect that any evidence was introduced in support of claimants' contention that greatly increased administrative costs will result from the court order requiring two payments per month. In addition, the trial court's express finding that the order of payment to the nonemployee spouse would not affect the supervision, protection, regulation, or guarantee of employee retirement benefits, and the finding that if some additional burden were placed on the claimants, the evidence did not establish such an undue burden as would interfere with the general purposes of the Act, would appear to support the conclusion that no excess administrative costs had been demonstrated to the Court.

The record, therefore, does not provide factual support for the order.

In addition, we do not find in any portion of ERISA, and claimants have not pointed out, authorization for such deduction. A reading of the overall Act leads to the conclusion that Congress intended that the expenses of administration be spread out among, and borne equally by, all participants in the Plan. We are aware of no authorization for the imposition of particular administrative costs against individual participants or beneficiaries.

Therefore, there being no factual support in the record, nor authority in the law, for the deduction of administrative costs from the Johnstons' pension benefits, the court's order authorizing such deductions was in error.

That portion of the judgment ordering direct payment to wife by claimants of one-half of the pension benefits payable to husband each month is affirmed. That portion of the judgment denying claimants' request for attorneys' fees is affirmed. That portion of the judgment authorizing the deduction of $5.00 per month from the Johnstons' pension plan benefits is reversed. In all other respects, the judgment is affirmed. Each party is to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION.

ALARCON, J.

We concur:

FILES, P. J.

KINGSLEY, J.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

December 20, 1978

I have this day filed Order

HEARING DENIED

In re: 2 Civ. No. 52160

Marriage of Johnston

Respectfully,

G. E. Bishel
Clerk

APPENDIX C

Constitutional and Statutory Provisions Involved.

1. Article VI, Clause 2 of the United States Constitution (U.S. Const. art. VI, cl. 2) provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. Section 3 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002, provides in pertinent part:

> "(6) The term 'employee' means any individual employed by an employer.
>
> "(7) The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.
>
> "(8) The term 'beneficiary' means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

3. Section 203(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1053(a), provides in perintent part:

> "(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age . . . ."

4. Section 205 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1055, provides:

> "(a) If a pension plan provides for the payment of benefits in the form of an annuity, such plan shall provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity.
>
> "(b) In the case of a plan which provides for the payment of benefits before the normal retirement age as defined in section 3(24), the plan is not required to provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity during the period beginning on the date on which the employee enters into the plan as a participant and ending on the later of—
>
> (1) the date the employee reaches the earliest retirement age, or
>
> (2) the first day of the 120th month beginning before the date on which the employee reaches normal retirement age.
>
> (c)(1) A plan described in subsection (b) does not meet the requirements of subsection (a) unless, under the plan, a participant has a reasonable period in which he may elect the qualified joint and survivor annuity form with respect to the period beginning on the date on which the period described in subsection (b) ends and ending on the date on which he reaches normal retirement age if he continues his employment during that period.

(2) A plan does not meet the requirements of this subsection unless, in the case of such election, the payments under the survivor annuity are not less than the payments which would have been made under the joint annuity to which the participant would have been entitled if he had made an election under this subsection immediately prior to his retirement and if his retirement had occurred on the date immediately preceding the date of his death and within the period within which an election can be made.

(d) A plan shall not be treated as not satisfying the requirements of this section solely because the spouse of the participant is not entitled to receive a survivor annuity (whether or not an election has been made under subsection (c)) unless the participant and his spouse have been married throughout the 1-year period ending on the date of such participant's death.

(e) A plan shall not be treated as satisfying the requirements of this section unless, under the plan, each participant has a reasonable period (as prescribed by the Secretary of the Treasury by regulations) before the annuity starting date during which he may elect in writing (after having received a written explanation of the terms and conditions of the joint and survivor annuity and the effect of an election under this subsection) not to take such joint and survivor annuity.

(f) A plan shall not be treated as not satisfying the requirements of this section solely because, under the plan there is a provision that any election under subsection (c) or (e), and any revocation of any such election, does not become effective (or ceases to be effective) if the participant dies within a period (not in excess of 2 years) beginning on the date of

such election or revocation, as the case may be. The preceding sentence does not apply unless the plan provision described in the preceding sentence also provides that such an election or revocation will be given effect in any case in which—

(1) the participant dies from accidental causes,

(2) a failure to give effect to the election or revocation would deprive the participant's survivor of a survivor annuity, and

(3) such election or revocation is made before such accident occurred.

(g) For purposes of this section:

(1) The term 'annuity starting date' means the first day of the first period for which an amount is received as an annuity (whether by reason of retirement or by reason of disability).

(2) The term 'earliest retirement age' means the earliest date on which, under the plan, the participant could elect to receive retirement benefits.

(3) The term 'qualified joint and survivor annuity' means an annuity for the life of the participant with a survivor annuity for the life of his spouse which is not less than one-half of, or greater than, the amount of the annuity payable during the joint lives of the participant and his spouse and which is the actuarial equivalent of a single annuity for the life of the participant.

(h) For the purposes of this section, a plan may take into account in any equitable fashion (as determined by the Secretary of the Treasury) any increased costs resulting from providing joint and sur-

vivor annuity benefits under an election made under subsection (c).

(i) This section shall apply only if—

(1) the annuity starting date did not occur before the effective date of this section, and

(2) the participant was an active participant in the plan on or after such effective date."

5. Section 206(d)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1056(d)(1) provides:

"(d)(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

6. Section 404(a)(1) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a)(1), provides:

"(a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

7. Section 409(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1109(a), provides:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

8. Section 514(a) and (c) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) and (c), provides:

"(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

* * * *

"(c) For purposes of this section:

(1) The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

9. Section 1021(c) of the Employee Retirement Income Security Act of 1974, 26 U.S.C. § 401(a)(13) provides:

"(c) RETIREMENT BENEFITS MAY NOT BE ASSIGNED OR ALIENATED.—Section 401(a) is amended by inserting after paragraph (12) the following new paragraph:

'(13) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the par-

ticipant's accrued non-forfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on the date of the enactment of the Employee Retirement Income Security Act of 1974."

10. Cal. Civ. Code § 687 provides:

"Community Property—Definition

"Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either."

11. Cal. Civ. Code § 5105 provides:

"The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests. This section shall be construed as defining the respective interests and rights of husband and wife in community property."

12. Cal. Civ. Code § 5125 provides:

"(a) Except as provided in subdivisions (b), (c), and (d) and Sections 5113.5 and 5128, either spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

(b) A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, *without the written consent of the other spouse.*

(c) A spouse may not sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property, without the written consent of the other spouse.

(d) A spouse who is operating or managing a business or an interest in a business which is community personal property has the sole management and control of the business or interest."